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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17 Mag. 1753 (DLC)

DAVID SHALAM,

Defendant. Bail Appeal

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New York, New York
March 13, 2017
10:00 a.m.

Before:

HON. DENISE COTE,

District Judge

APPEARANCES

JOON KIM
Acting United States Attorney for the
Southern District of New York
BY: ALISON G. MOE
Assistant United States Attorney

JOSEPH A. BONDY
Attorney for Defendant

(Case called)

MS. MOE: Yes, your Honor. Good morning. Alison Moe, for the government. I am joined at counsel table by Special Agent Leslie Adamczyk from the FBI and forensic examiner Porsche Brown, also from the FBI, and John Moscato from pretrial services.

MR. BONDY: Good morning, your Honor, Joseph A. Bondy on behalf of David Shalam. How are you?

THE COURT: Good morning, everyone.

This is an appeal from a bail decision made by the magistrate judge. It's the government's appeal. I have read the pretrial services officer's report. I don't see a date on it, but it's a -- oh, yes, the last page, March 10 report, and I have read the complaint filed on March 9.

I will hear from the government.

MS. MOE: Thank you, your Honor.

Your Honor, this is not a close case at all. The defendant clearly poses both an extreme danger to the community and a significant flight risk. There are no conditions that would assure of the safety of the community and the defendant's appearance in court.

Before addressing the bail factors, it bears emphasizing at outset, your Honor, that today's appeal is all that stands between this defendant, who is charged with paying a woman to rape her children so he could watch over Skype, and

that same defendant going home today to his house, where minor children are present and there are computers and other Internet capable devices. That's what Judge Ellis' order permits.

Turning first to the issue of danger, the offense conduct illustrates that the defendant poses a clear danger to minors. Again, he's charged with paying a woman to molest her own children in live child pornography shows. Those children were six and eight at the time of the offense, and the defendant took an active role in their abuse, directing the woman who is identified in the complaint as Jane Doe as to what sexual acts he wanted her to perform and which children he wanted her to perform them with.

The acts that are included in the complaint are just a small sample of the conversations that occurred. In one instance the defendant told Jane Doe to digitally penetrate her own six-year-old daughter. In another conversation he instructed Jane Doe to engage in oral sex with her eight-year-old son, and in yet another conversation the defendant told Jane Doe that he wanted that same six-year-old girl to watch him ejaculate on video. This offense conduct occurred over a lengthy time period, from April 2015 to January 2016. Significantly, the conduct only stopped because Jane Doe closed her account when she learned that she was likely to be arrested.

After Jane Doe closed her account, the defendant still

continued to use that same Skype account that he used to commit these other offenses. We know this from IP logs that reflect that the defendant continued to use that account. This account was registered under a pseudonym and all indications point that this was in effect the defendant's secret child pornography account. Most recently, last week, the defendant was caught in possession of child pornography.

So, in sum, all of the evidence demonstrates that the defendant's desire to view images of sexually abused children has not diminishes. There can be no question that this defendant poses a significant danger to minors.

Turning to the question of flight risk, your Honor, count one carries a mandatory minimum sentence of 15 years' imprisonment if the defendant is found guilty. Faced with the prospect of such a steep penalty, the defendant has a strong incentive to flee. On that point the government submits that the evidence outlined in the complaint has put the defendant on notice that the evidence against him is very strong.

The defendant is a man of considerable means, as the pretrial services report outlines, and so he has every reason to flee and every means to do so.

Finally, as the Court is aware, a defendant can easily cut off an ankle bracelet and flee.

Given the danger that this defendant poses to the community and the significant flight risk he poses, there are

no conditions that would adequately address these risks.

The defendant if bailed would go home to a house filled with computers, smart phones and other Internet-capable devices. That presents an unacceptable risk that this defendant will harm minors.

On this point, your Honor, I would direct the Court's attention to an opinion from the Eastern District of New York issued in 2014. In that case, the case is United States v. Valerio, at 9 F.Supp.3d 283. It is a 2014 opinion from the Eastern District of New York authored by Judge Bianco.

In that case the defendant was charged with a very similar offense and sought bail and Judge Bianco, I'm reading from page 294 of the reporter, observed, "As part of his bail package, the defendant agrees to not possess, much less use or access a computer or other Internet-capable device and agrees to unannounced searches of the house and all persons therein. Under the circumstances of this case, however, the Court finds these conditions are difficult, if not impossible, to enforce and are otherwise insufficient to assure the safety of the community. Even with the presence of a guard inside the home at all times and the taking of steps to prevent electronic devices from being in the house, there's no way to ensure the full monitoring of the defendant's activities. Computers, mobile phones, tablets, etc., the types of instrumentalities allegedly used to commit the crimes are ubiquitous and easy to

procure or hide, and increasingly even the lowest level devices have Internet functionality. Unlike in a jail, which provides greater layers of security to attempt to insure that inmates do not possess contraband the Court can conceive of several avenues through which the defendant may procure or retain such devices on the premises, which heightens the risk of danger to the community."

In this case, your Honor, Judge Ellis's order permits the defendant to reside in a home with computers subject to computer monitoring, in other words, the conditions that were set were lower than the worst-case scenario that Judge Bianco was envisioning when he denied bail in a very similar case.

My understanding of the pretrial services computer monitoring program is that it does not involve realtime monitoring of computer activity. Instead, pretrial services will just get a weekly summary of the defendant's activity on all of the computers in the home.

Pretrial services cannot monitor any phones used in the home, which is problematic, given that Skype and many other apps used to commit offenses like this can be used on a smart phone, and pretrial services also cannot monitor any tablet, which poses similar risks.

This presents several problems.

First, the defendant could harm minors for an entire week without pretrial knowing.

And, second, when pretrial reviews web traffic, it will be impossible to tell which family members within the home are accessing which websites, and it will be impossible for pretrial to differentiate between activity that may seem innocent. For example, pretrial services may see logs again a week later that reflect a member of the household has used an Internet platform for video or chat communication, but there can be no way of knowing if that is one of the defendant's children using something like FaceTime or Skype in an innocent manner or whether it is the defendant harming minors.

A representative from pretrial services, John Moscato, is here today and is prepared to address any questions the Court might have about electronic monitoring.

Unless the Court has any questions, I just want to conclude by emphasizing that this is a presumption case by statute. In establishing a mandatory minimum and a presumption of detention, Congress intended for this exact type of conduct to be treated by the Court as serious.

This defendant is actually the type of defendant these laws have in mind. If there were ever a defendant who were suitable for detention and where detention were required, it would be this defendant.

Thank you, your Honor.

THE COURT: Mr. Bondy.

MR. BONDY: Thank you, your Honor. Your Honor, when

we appeared in front of Judge Ellis, we had a pretrial services report that called for a bond to be cosigned by two financially responsible people. Judge Ellis amplified that more than double.

We had ultimately four suretors vetted by the U.S. Attorney's office and Mr. Shalam's wife, a fifth suretor for moral suasion purposes. All signed on to a half a million dollar bond, a significant bond with respect to this family.

There are factors to be considered today, and I note that in arriving at a combination of factors, to the extent the Court can, it's really the least restrictive set of factors.

We have offered up electronic monitoring, home detention. He will not have any smart phone, computer device of any sort. I am listening to the government talk about the children that do live in the home, two of whom are adults and three of whom are minors, and their tablet and their phone issues. I would like to think there's some means to address that through court order or otherwise.

THE COURT: Such as?

MR. BONDY: Well, I have two things I will propose. Because it's least restrictive, I'll throw it out there. Since the time of Judge Ellis's determination, I have reached out to the government and tried to negotiate a consent package with them. We have five suretors, your Honor. I would amplify the number of suretors. We can amplify the amount of the bond. We

can amplify the amount that the bond is secured by. We could have a group of third-party monitors, as I think the Bail Reform Act allows.

THE COURT: What do you mean? Third-party monitors for what purpose?

MR. BONDY: Who, quote, agree to assume supervision and to report any violation of the release condition to the Court subject to 18 U.S. Code Section 3162 Section (c)(1)(B)(i).

So I have Mr. Shalam's rabbi in the court. He's part of a religious community. He has over 15 family members in the Court who are all aware of the nature of the allegations against him. All of them would be willing to serve in some capacity to either check in with him every day, report violations to the Court. He would submit to daily pretrial visits if that was what was necessary.

And, as a final resort, if the Court can't get over the problem of children in the home and their tablets, Mr. Shalam's father is here today. He's 87 years old. Mr. Shalam would live with him. He doesn't have electronic devices in his home. Indeed, he has a medical issue that Mr. Shalam is already assisting him with and is a caregiver for.

So if the issue comes down to we cannot secure that home in a way that satisfies the Court that Mr. Shalam is not

going to be engaging in the type of conduct alleged in Count One we could move to another home.

I would also note and this was a big deal at last week's proceeding, that the woman Mr. Shalam is alleged to have been involved with was apparently arrested in Romania and charged with multiple counts of similar nature, pulled the plug on the Skype account.

I had invited the government last week and invited them again, since they had argued he was a predator who needed to be locked up and was the quintessential predator, to identify any evidence of him subsequent to this count being closed engaging in any of the type of conduct alleged in Count One, which of course triggers a presumption.

Magistrate Ellis thought that was material, because it evidenced some ability of this man to control himself and not to just be out of control so to speak.

So I don't think there's any other evidence since January of 2016 to show a continuing series of violations of that type of behavior, the directing of or the promoting or the enticing or the inducing of a child's pornographic performance.

Obviously, we have a presumption of innocence here, and nothing I'm saying I intend to have undermine that. But it seems to me that in this case, if we were to have a number of suretors, a bigger bond, a monitoring team in place in the home, a curfew -- obviously he's under home detention and any

other kinds of devices pretrial services last week had indicated to Judge Ellis that they could place on a telephone to determine what's being visited or on a computer to determine what's being viewed, all of those would be consented to. There's not one of these conditions that we wouldn't consent to.

However, I believe that, in looking at the man himself, for 50 years he has never had any contact with the criminal justice system. Obviously he's not on parole or any other type of supervised release during the commission of this offense.

The offense is morally repugnant, morally repugnant and occurs over a nine-month period as alleged by the government. I had suggested to the magistrate that it's easy on place a multiplier on that because of the repugnancy of the charge and to say this is the nature of the person and that he is a bad human being. But that is not his nature and that's not his true self, and the way that he gets here is the way many defendants get into this courtroom. There have been people who have appeared even in front of your Honor with substantial mandatory minimum sentences they were facing in cases involving minors who the government agreed to bail on and then who ultimately were sentenced to relatively low periods of incarceration.

So I understand the presumption starting out. I

understand, as this man does, the mandatory minimum in effect. I understand the mandatory minimum in effect as to Count Two because there is a five-year mandatory minimum.

Nonetheless, there is a combination of conditions I believe, your Honor, that could satisfy the safety of the community.

I have his travel document. I've always offered the travel document, the passport. I have it with me. That was not the emphasis of our argument in front of the magistrate. What was the emphasis clearly was this danger to the community.

I am not sure if the Court has any questions for me. If the Court would like to hear from Mr. Shalam's rabbi, who has come in from Brooklyn, and would speak to him being able to be supervised as well within that community and for that community participating in the system as well.

I think that somewhere along what I have lain out there is a set of conditions. I ask the Court to find the least restrictive set of conditions so that Mr. Shalam can be home and try to start to repair the family relationships, as you can imagine and appreciate, and at the same time be able to defend himself from outside of the MDC.

Thank you.

THE COURT: Thank you.

The structure of addressing this bail application is set forth in a Second Circuit decision United States v.

Mercedes, 254 F.3d 433. As a presumption case, the defendant bears a limited burden of production. I find he's met that with the proffer of the sureties and the other arguments he's presented today.

With that, the burden shifts to the government to convince me that detention is the only appropriate alternative here. The presumption, however, remains a factor to be considered in the analysis.

The government has the ultimate burden of persuasion by clear and convincing evidence when it comes to whether or not the defendant presents a danger to the community. The government has the burden of persuasion by a preponderance of the evidence when the issue is a risk of flight.

The parties have principally focused on danger to the community, though the government argues under both prongs. In terms of flight, there is the mandatory minimum term of imprisonment, the means to flee, the history of international travel, perhaps to some countries from which there is no extradition.

But let me principally focus on the danger to the community. I have to consider the factors set forth in Section 3142(g), so let me begin with that.

The nature and circumstances of the crime charged, obviously an extraordinarily serious offense committed over the Internet across international lines, but able to be committed

over the Internet in this country as well, a crime that Congress views with significant seriousness, given the nature of the punishment imposed, and that includes the presumption of the mandatory minimum that will apply here.

The second factor is the weight of the evidence against the defendant. It appears extremely strong from the complaint, including a postarrest statement, seizures of materials and document reflecting the Internet traffic, and it is not argued to me that it is not significant.

The third is the history and characteristics of the defendant, including family ties, employment, community ties and past conduct.

The defendant has no criminal record. He has family ties and community ties. He had employment, though he conducted crime in part from his home and in part when he was traveling and in part from his workspace, and the bail package is a concession that he cannot leave his home again.

The fourth factor is the nature and seriousness of the danger to the community or to an individual.

Obviously the danger is extraordinary. It involves innocent children who are unable to defend themselves or protect themselves. This is an issue of de novo review by this Court.

I appreciate that Judge Ellis put together a package that he considered appropriate. I appreciate that pretrial

services considered a package that they deemed appropriate. But as our conversation today indicates, what you really need is someone to monitor the defendant 24/7 to ensure that he has no access to the Internet.

That can't happen in the family home. No one is able to do that in the family home. The family home will have Internet devices. There's no daily or weekly check-in that can assure that the defendant doesn't have access to those devices in the family home.

I hear today -- I don't know that this was presented to Magistrate Judge Ellis, that the defendant would move to his father's home that doesn't have an Internet capacity. But, again, in this day of smart phones you don't need an Internet plan as the only way to ensure an Internet plan with a computer in the home. The only way to ensure that the defendant has no Internet access and is not able to victimize other children in this way is the restriction argued by the government, which is detention.

For all those reasons, I order the defendant to be detained.

MR. BONDY: I hear you, your Honor. But may I ask for say ten suretors secured by a million dollars worth of property.

THE COURT: No. You may ask, but that is isn't going to change the ruling, and I have ruled.

MR. BONDY: No guard in the home? There will be nothing, your Honor.

THE COURT: I gave you a full opportunity to argue, Mr. Bondy. We are not going to have reargument.

MR. BONDY: I understand. Thank you.

THE COURT: Thank you.

(Adjourned)